

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM MICHAEL NOWICKI,

Defendant-Appellant.

UNPUBLISHED

May 22, 2012

No. 302664

Tuscola Circuit Court

LC No. 10-011614-FH

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right jury convictions on two counts of first-degree retail fraud, MCL 750.356c, and one count of conspiracy to commit second-degree retail fraud, MCL 750.356d. We affirm.

This case arises from two incidents of retail fraud committed by defendant and Nancy Diem, his former wife, at two different stores. Diem testified against defendant pursuant to a plea agreement. On direct examination, Diem explained that she and defendant went to the stores and filled up two shopping carts with items. They then proceeded to the checkout, where the items in the first cart were rung up, bagged, and placed back in the cart. Defendant then left the store with the first cart, taking it to his vehicle located in the parking lot. Diem stayed behind in the store while the second cart of items were rung up, bagged, and placed back in the cart. She would then attempt to pay for the items with defendant's credit card, which was declined. After feigning surprise, Diem told the cashiers that defendant, who was out in the parking lot, had money or another credit card. She then exited each store under the pretense that she would be returning to pay for the items. However, instead, she entered the vehicle, which defendant had pulled up to the front door, and they left the stores with the first cart of unpaid items.

On cross-examination, defense counsel challenged the veracity of Diem's testimony. First, defense counsel questioned her about the specific plea agreement details and her failure to receive jail time for her role in these crimes. Second, defense counsel questioned Diem about parenting time arrangements that she had with defendant regarding their two children, including that (1) Diem insisted on being present during all of defendant's parenting time which was not required by a court order and (2) that Diem had filed an unsuccessful petition to terminate defendant's parenting time. In response to such questioning, Diem testified that she had refused to allow defendant parenting time because "he was usually homeless." Third, defense counsel

questioned Diem about her unsuccessful report of domestic violence against defendant and Diem testified that she was told that “he had to beat me up three times first.” Fourth, defense counsel questioned whether defendant had threatened Diem regarding her trial testimony and Diem testified that defendant had called her names during the court’s lunch break.

On redirect examination, the prosecution questioned Diem about what defendant had allegedly said to her during the lunch break and she replied that defendant had jumped in her car and called her names using foul language. The prosecution also questioned Diem about her refusal to allow defendant to have parenting time with their children and she replied that it was because defendant “was usually homeless and no car seats, no food, no clothes. . . . sleeping in tents and forts.” Diem testified that she attempted to stop defendant’s parenting time through the proper legal process by petitioning the court.

After defendant was found guilty of two counts of first-degree retail fraud and one count of conspiracy to commit second-degree retail fraud, he filed a motion for a new trial based on prosecutorial misconduct and defense counsel’s failure to object to that misconduct. Defendant argued that the prosecutor committed misconduct by questioning Diem about irrelevant and prejudicial issues. A *Ginther*¹ hearing was held at which time defense counsel testified that the defense strategy was to challenge the credibility of Diem, the primary prosecution witness. And defendant was aware of this strategy. Thereafter, the trial court denied defendant’s motion. This appeal followed.

On appeal, defendant argues that the prosecutor committed misconduct by eliciting irrelevant and highly prejudicial testimony about defendant which prejudiced his defense and that he was denied the effective assistance of counsel because his attorney failed to object to this misconduct. We disagree.

Defendant failed to object to the prosecutor’s comments during trial; therefore, defendant’s claim of prosecutorial misconduct on appeal is unpreserved and is reviewed for plain error affecting his substantial rights. See *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Defendant’s claim of ineffective assistance of counsel is preserved and presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of law are reviewed de novo and the trial court’s findings of fact, if any, are reviewed for clear error. *Id.*

Defendant first argues that the prosecutor committed misconduct by “eliciting irrelevant and very prejudicial testimony” from Diem about his (1) poverty, including homelessness, (2) alleged history of domestic violence, including that he had threatened Diem over the court lunch break, and (3) “not providing for his children.”

The role of a prosecutor is to seek justice, and not merely to obtain convictions. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutorial misconduct occurs when a defendant is denied a fair and impartial trial. *Id.* A defendant’s opportunity for a fair trial can be

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

jeopardized when the prosecutor interjects issues broader than defendant's guilt or innocence. *Id.* at 63-64. Issues of prosecutorial misconduct are considered on a case-by-case basis by examining the record and evaluating the prosecutor's remarks in context, and in light of the defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Here, the defense strategy was to discredit Diem's testimony. Toward that end, defense counsel questioned Diem (1) about the plea agreement that she received in exchange for her testimony, (2) about her hesitance to permit defendant to exercise his parenting time with their children, as well as her unsuccessful attempt to stop his parenting time, and (3) Diem's filing of an unsuccessful domestic violence report against defendant. In response to defense counsel's questioning, Diem testified that defendant was "usually homeless" and had called her names during the court's lunch break. Clearly, defense counsel attempted to suggest to the jury through this line of questioning that Diem's testimony was the product of improper motive, bias, and hostility toward defendant rather than the truth. And it was during this questioning that much of the testimony was elicited that defendant alleges was irrelevant and prejudicial.

Further, because defendant raised these particular issues regarding his parenting time and history of violence and threats against Diem, the prosecutor was entitled to full, and not just selective, development of these issues. *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993). That is, a prosecutor is entitled to fairly respond to issues raised by a defendant. *People v Jonathan Jones*, 468 Mich 345, 353 n 6; 662 NW2d 376 (2003); *Brown*, 279 Mich App at 135. And a prosecutor has a right to rehabilitate his witness after defense counsel attacks the witness' credibility. *People v Valmarcus Jones*, 240 Mich App 704, 707 n 1; 613 NW2d 411 (2000). Here, defense counsel attempted to establish during cross-examination that Diem's testimony was the result of improper motive, bias, and hostility toward defendant. The prosecutor properly limited the scope of redirect examination to address the purported support for these claims of bias, improper motive, and hostility raised by defense counsel. Accordingly, defendant has failed to establish plain error affecting his substantial rights. Further, defendant's claim that he was denied the effective assistance of counsel because his attorney failed to object to the prosecutor's questions to Diem as discussed above is likewise without merit. Defense counsel cannot be deemed ineffective for failing to make a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Affirmed.

/s/ Deborah A. Servitto

/s/ Mark J. Cavanagh

/s/ Karen M. Fort Hood